In the Supreme Court of the United States

OCTOBER TERM 1940

No. 267

SIX COMPANIES OF CALIFORNIA, a corporation, and HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation, FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation, THE AETNA CASUALTY AND SURETY COMPANY, a corporation, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, a corporation, AMERICAN SURETY COMPANY OF NEW YORK, a corporation, MARYLAND CASUALTY COMPANY, a corporation, UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation, THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, a corporation, GLENS FALLS INDEMNITY COMPANY, a corporation, STANDARD SURETY AND CASUALTY COMPANY OF NEW YORK, a corporation, STANDARD ACCIDENT INSURANCE COMPANY, a corporation, MASSACHUSETTS BONDING AND INSURANCE COMPANY, a corporation, CONTINENTAL CASUALTY COMPANY, a corporation, and NEW AMSTERDAM CASUALTY COMPANY, a corporation,

Petitioners,

vs.

JOINT HIGHWAY DISTRICT NO. 13 OF THE STATE OF CALIFORNIA, a public corporation,

Respondent.

Brief of Respondent in Opposition to Petition for Writ of Certiorari.

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STATEMENT OF THE CASE.

1. The issue in this court.

Petitioner, Six Companies of California, hereinafter will be referred to as "Contractor". The remaining petitioners, all surety companies, sureties on the faithful performance bond of the Contractor given in connection with the contract hereinafter mentioned, will be referred to as "Sureties". Respondent, Joint Highway District No. 13 of the State of California, a public corporation of the State of California, will be referred to as "District".

On June 4, 1934, the Contractor agreed with the District to construct a highway, which included twin tunnels, for the sum of $3,683,931 (Finding VII, R. 146-7; Pl's. Ex. 16, Vol. VIII Book of Exhibits 157, 162). Upon completion the same was to become a free public highway of the State of California (R. 2530). On June 13, 1936, when the work was about 70% complete (Finding XIII, R. 183) the Contractor wrongfully abandoned the same (Finding XIV (Par. 9), R. 188). The Contractor claimed a right to rescind the contract, abandoned the work (Finding IX, R. 148) and brought suit against the District for the sum of $3,259,695.04, the difference between the alleged reasonable value of the work performed and the sums theretofore paid the Contractor by the District (R. 3-5). With reference to the time of completion, the contract provided that time was "of the essence hereof" (Pl's. Ex. 16, Vol. VIII Book of Exhibits 157, 163).

The District filed a cross complaint against both the Contractor and the Sureties claiming three items of damage because of the Contractor's breach of contract, as follows:

(1) $69,001.85, the reasonable expense of protecting the work, and incidental expense to which the District was put because of the abandonment (Cross Complaint IX, R. 50-2);

(2) $108,066.31, the increased cost to the District of completing the work under new contracts over and above the original contract price after giving the Contractor credit for all sums earned by the Contractor before abandonment but not yet paid (Cross Complaint X, R. 52-3); and

(3) $206,500 damages for delay for 433 days' delay caused by the Contractor's abandonment, at the stipulated sum provided in the agreement of $500 a day as liquidated damages for delay (Cross Complaint XI, XII, R. 53-5; XIV, R. 57-9).

The petitioners (Contractor and the Sureties) in asking for certiorari herein do not question the correctness of the findings in the main case which find that the Contractor wrongfully abandoned the work and was entitled to no damages against the District (Finding L, R. 216; Conclusions of Law Par. 1, R. 216). Neither do petitioners complain of the amounts awarded the District for the damage noted under sub-paragraphs (1) and (2) above.

Petitioners' sole claim for relief in this court is that liquidated damages for delay were improperly allowed[1] (Petitioners' Brief pp. 5, 12-13).

The court's findings on delay and the sufficiency of the evidence to support these findings are not challenged. The

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(1) Unless otherwise stated all emphasis appearing herein is supplied.

court found that the following delays were occasioned through the fault of the Contractor (Finding XXXIII, R. 199-201).

(a) 20 days' delay before the contract was abandoned from May 24, 1936, when completion was due, to June 13, 1936, when abandonment took place (R. 199-201).

(b) 149 days' delay, the reasonable time required for the District to measure the unfinished work, prepare new specifications for bids, secure new bids and let new contracts (R. 200-1).

(c) 264 days' delay, the reasonable time required to complete the work abandoned by the Contractor after new contracts were let (R. 200-1).

The aggregate delay was a *total of 433 days* (R. 201).

The trial court found that 149 days was a reasonable time for the District to measure the work and do all the things mentioned in subparagraph (b) above; and the court also found that the District proceeded with all reasonable dispatch so to do (R. 200). The trial court, however, did not allow the District any liquidated damages for this 149 days' delay (Finding XXXVI, R. 204; Conclusions of Law Par. 3, R. 217). The theory of the trial court was that after abandonment the court was limited to awarding liquidated damages for delay to the period prior to abandonment and to such additional period as represented the reasonable time to complete the work, and that no other delay could be considered (Opinion of Trial Court R. 137-140). This ruling was in favor of petitioners and eliminated 149 days' delay from consideration. The District took no

appeal therefrom; therefore that matter is not now before this court. Because of this ruling the amount awarded as liquidated damages was $142,000 instead of $206,500, pleaded and proved by the District.

Two contentions only are urged by petitioners on this court:

1. Under California law no liquidated damages are recoverable for delays which occur *after* abandonment. Petitioners concede that if liquidated damages are allowable, the award of $10,000 under (a) above for 20 days' delay *before* abandonment was proper.

2. Petitioners also claim that under California law no award whatever for liquidated damages should have been made.

Thus the only matter before this court is the correctness of the award for liquidated damages of $142,000, and under one contention of petitioners $10,000 of this sum is not questioned. We challenge each of these contentions.

2. Errors in petition and petitioners' brief.

There are certain inaccuracies in the petition and in Petitioners' Brief which should be noted. Petitioners, at page 4, say:

> "Respondent neither pleaded nor attempted to prove it had sustained any actual damage from any delay."

Again, at page 13, they say:

> "The cross complaint neither alleged nor asked any actual damages from delay, but the part thereof claiming damages from delay was based entirely on

the quoted provision in the contract for liquidated damages (R. 53-58)."

The statement that the District neither pleaded nor proved actual damages for delay is in error. In both pleading and proof the District claimed substantial actual damage from delay in addition to the other items of damage resulting from abandonment, which we have mentioned, separate and apart from delay, such as increased cost of completing the work, cost of protecting and measuring the work, and the other incidental items hereinbefore referred to (supra, p. 3) which are alleged in paragraphs IX and X of the cross complaint (R. 50-3).

Pleading of actual damage and of liquidated damage.

The damages resulting solely from delay are pleaded in paragraphs XII and XIII of the cross complaint (R. 55-7). Therein it is alleged that the District itself sustained an actual damage of $272.89 a day, the expense of a staff of engineers and other employees and in keeping a District organization intact. This expense would have ceased upon completion of the project (R. 57). It was also alleged that during the period of 433 days' delay the District was required to pay interest on its outstanding bonded indebtedness amounting to $89,832.67 without having the enjoyment of the completed project (R. 57). It was also alleged that the project provided an improved highway with easier grades and a shorter route between portions of the state of California and the cities of Oakland and San Francisco (R. 56). That more than 1,600,000 vehicles a year traveled the former routes which the new

highway was to supplant all of which traffic could be more safely and economically transported over the new highway; that the resulting loss, inconvenience and damage caused by delay in opening the project for use as a public highway was exceedingly great and impracticable of exact ascertainment, but exceeded $500 a day (R. 56).

Proof of actual damage and of liquidated damage.

At the trial the average cost of operating the District during the period of delay was proved to be $272.89 a day (R. 2522-4, 2534-6; Ex. X-114 Book of Exhibits Vol. VIII 595). It was also proved that the interest charges during the period of delay for interest on the District's outstanding bonds for the project was $89,832.67 (Ex. X-115; R. 2527-8). The proof also showed that independent of this actual damage to the District *as a public corporate entity* there was other damage not capable of exact ascertainment. The importance of the new highway was conceded. The number of vehicles using the old routes which the new highway was to replace was testified to as 1,911,870 vehicles annually, an average of 5,238 vehicles a day (R. 2532). There was an average saving of two miles by use of the new highway over the existing routes (R. 2532). Based upon the number of vehicles using the old highway there was a loss of $419.04 a day to the traveling public in extra cost for transportation alone because of inability to use the new route (R. 2544-6).

No evidence was introduced by the petitioners to contradict the proof of the District with reference to any of the above items of damage.

Finding of actual damage and of liquidated damage.

The court's findings on all items of damage are in accord with the District's proofs (Finding XXXV, R. 202-4). The court also found that the daily expense to the District of $272.89 a day would be entirely eliminated upon completion of the project (R. 203). The amount paid as interest was also found (R. 204). The court also found that the loss caused by the delay in opening the project was great, was incapable of exact ascertainment, but exceeded $500 a day (R. 203). Likewise it is found that a total of 433 days' delay was caused by the abandonment (Finding XXXIII, R. 199-201).

3. The actual damages caused by the delay exceed the amount awarded as liquidated damages.

It should be noted that the actual damages which the District itself suffered from delay exceed the $142,000 awarded as liquidated damages. Interest during the 433 day period of delay on the District's outstanding bonds, issued to finance the project, amounted to $89,832.67 (R. 203-4). Expense of operation during this period is 433 times $272.89 (the per diem cost of operation) or $118,161.37. The total of the two items is $207,994.04.

If we take the lesser period of delay of 284 days, for which the trial court allowed liquidated damages, the actual damage to the district, *as a public corporate entity*, approximates the liquidated damages allowed.

284 times $272.89 is	$ 77,500.76
The interest item for the 284 day period is	58,920.28 (R. 2528)
Total	$136,421.04

The above calculations are without any consideration whatever of the very real additional damage of over $500 a day suffered by those of the traveling public who could have used the highway if completed.

The findings that the delay was entirely the fault of the Contractor are not questioned by petitioners. The allowance of liquidated damages for delay instead of actual damages for delay lessened the liability of the Contractor and the Sureties.

SUMMARY OF ARGUMENT.

1. The decision in the California case of *Sinnott v. Schumacher* does not control the decision in the instant case.

(a) The decision in *Sinnott v. Schumacher*, 45 Cal. App. 46, 187 Pac. 105, was by one of the four intermediate appellate courts in the State of California and not by the highest court of the state. The law as announced by the highest court of a state, not by an inferior court, is the law which the Federal courts are required to follow.

(b) The denial by the Supreme Court of California of a petition for a hearing in that court after a decision by a District Court of Appeal does not mean approval by the Supreme Court of the opinion and decision of the lower court. Such denial means only that the Supreme Court in the exercise of a sound discretion did not deem the case, or the matters decided therein, of sufficient importance to warrant that court entertaining the peti-

tion. In determining whether or not a decision by a District Court of Appeal should be reviewed by the Supreme Court of California, the position of that court is like the position of this court in determining whether or not a writ of certiorari should issue to a circuit court of appeals.

(c) The decision of one District Court of Appeal in the State of California is not binding upon another District Court of Appeal. It would be an anomaly to hold that the United States Circuit Court of Appeals is bound by such decision when neither the Supreme Court of the State nor the other District Courts of Appeal of the State are so bound.

(d) The District Courts of Appeal in California are not courts of statewide jurisdiction.

(e) When a reference is had to the record in the *Sinnott* case, and the decision in that case is read in the light of the record, it clearly appears that the District Court of Appeal did not decide that liquidated damages could not be recovered for any delay which occurred after abandonment of the contract. On this point the opinion in that case does not discuss the facts, or cite any authoritly, or reason the matter in any way. Only by a reference to the record in the case can it be determined what the issues were and what the court meant by the language of its opinion. The defendants (building owners) had recovered a substantial award for damages resulting from the increased cost of completing the work after abandonment. Upon appeal by the defaulting contractor the appellant contended that the contract provi-

sion for liquidated damages for delay, was a limitation on the owners' right to recover other damages caused by the abandonment, such as the award for increased cost of completion.

Where the court, in the opinion of *Sinnott v. Schumacher* (45 Cal. App. 46), at page 52, said:

> "* * * but this provision of the contract has no application to a condition wherein the contractor is shown to have abandoned his contract without sufficient cause, in which case the right of the defendants to damages as a result of the plaintiff's breach of said contract could not be *affected or limited* by said provision of the contract for a penalty for delay in the completion of the structure beyond the stipulated time for such completion."

the court was answering the contention of the contractor therein that the liquidated damage clause in the contract *limited or affected* the right of the owners to recover the full measure of their damage due to the increased cost of completion. The court did *not* decide that liquidated damages for delay could not be recovered after abandonment in a proper case, but did decide that the trial court had properly allowed the owners their actual damage for the increased cost of construction, and that the right to recover such damage was not affected because there was a liquidated damage clause in the contract.

(f) The opinion in *Sinnott v. Schumacher* cannot be regarded as authority settling an important question of local law. It is not of sufficient importance to warrant the Supreme Court of the United States reviewing

the action of the Circuit Court of Appeals in the instant case.

2. The stipulation in the contract providing for liquidated damages is a valid provision under the law of the State of California.

3. The liquidated damage clause is valid and the case was tried by the District on that assumption, but even if invalid, such holding would be of no benefit to petitioners because the actual damage suffered by the District as a public corporate entity exceeds the amount awarded to the District as liquidated damages.

ARGUMENT.

I.

DISCUSSION OF THE EFFECT OF THE DECISION IN THE CASE OF SINNOTT v. SCHUMACHER.

a. The Federal courts are required to follow the law of the State of California as announced by the highest court in the state.

Petitioners' position on this point is that *Sinnott v. Schumacher,* 45 Cal. App. 46, 187 Pac. 105, even though not a decision of the California Supreme Court, the highest court in the state, announces the law in California and until that holding is set aside by decision of the California Supreme Court the same should be followed by the Federal courts in this case.

In this reasoning petitioners are in error and misconstrue the decision of *Erie Railroad Co. v. Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188. The *Erie* case and the later decision by this court in *Lyon v. Mutual Benefit etc. Assn.,* 305 U. S. 484, 59 S. Ct. 297, 83 L. Ed. 303, which follows the rule of the *Erie* case, recognize that it is the law as announced by the *highest* court in the state which the Federal courts should follow.

We have examined the decisions since the pronouncement in *Erie Railroad Co. v. Tompkins,* supra, and have noted below Federal cases on appeal which cite the *Erie* case.[2] In all of these cases recognition is given

(2) *Lyon v. Mutual Benefit Health & Acc. Assn.,* 305 U. S. 484, 59 S. Ct. 297, 83 L. Ed. 303, 307; *Sommer v. Nakdimen,* 97 F. (2d) 715, 719 (1938) (C. C. A. 8th); *Perkins v. U. S.,* 99 F. (2d) 255, 258 (1938) (C. C. A. 3rd); *Rosenthal v. N. Y. Life Ins. Co.,* 99 F. (2d) 578, 579 (1938) (C. C. A. 8th); *American Nat. Ins. Co. v.*

to the fact that it is the state law as pronounced by its *supreme* or *highest* court which becomes the rule of decision.

The precise point was passed upon in the case of *West v. American Tel. & Tel. Co.*, 108 F. (2d) 347 (1939) (C. C. A. 6th). The reasoning of the lower court in the instant case is confirmed by that opinion. See, also, the decision in *Field v. Fidelity Union Trust Co.*, 108 F. (2d) 521, 523 (1939) (C. C. A. 3rd), cited at page 30 of Petitioners' Brief. The opinion in that case sums up the matter as follows (526):

> "We believe that the proper rule is that federal courts should in all instances follow the law of the state with respect to the construction of the state statutes. Where that law has been determined by the courts of last resort their decisions are stare decisis, and must be followed irrespective of our opinion as to what the law ought to be. As to the pronouncements of other state courts, however, *we*

Belch, 100 F. (2d) 48, 50 (1938) (C. C. A. 4th); *Luhman v. Hoover*, 100 F. (2d) 127, 129 (1938) (C. C. A. 6th); *Wunderlich v. Franklin*, 100 F. (2d) 164, 166 (1938) (C. C. A. 5th); *North American Acc. Ins. Co. v. Anderson*, 100 F. (2d) 452, 455 (1938) (C. C. A. 10th); *Kansas Gas & Electric Co. v. Evans*, 100 F. (2d) 549, 550 (1938) (C. C. A. 10th); *Colorado Life Co. v. Steele*, 101 F. (2d) 448, 450 (1939) (C. C. A. 8th); *Aetna Life Ins. Co. v. Conway*, 102 F. (2d) 743 (1939) (C. C. A. 10th); *Rodgers v. Mabelvale etc. Imp. Dist.*, 103 F. (2d) 844, 846 (1939) (C. C. A. 8th); *Futrell v. Branson*, 104 F. (2d) 409, 410 (1939) (C. C. A. 8th); *Baskin v. Montgomery Ward & Co.*, 104 F. (2d) 531, 533 (1939) (C. C. A. 4th); *National Candy Co. v. Fed. Trade Com.*, 104 F. (2d) 999, 1005 (1939) (C. C. A. 7th); *Investors Syndicate v. Smith*, 105 F. (2d) 611, 620 (1939) (C. C. A. 9th); *N. Y. Life Ins. Co. v. McCurdy*, 106 F. (2d) 181, 187 (1939) (C. C. A. 10th); *Demers v. Railway Express Agency*, 108 F. (2d) 107, 109 (1939) (C. C. A. 1st); *Abbott v. Railway Express Agency*, 108 F. (2d) 671, 672 (1940) (C. C. A. 4th).

are not so bound, but may conclude that the decision does not truly express the state law."

The fact that certiorari was granted recently by this court in *Field v. Fidelity Union Trust Co.,* supra, where the Circuit Court of Appeals for the Third Circuit decided it was not bound by the decision of a court other than the Supreme Court of the State of New Jersey, furnishes no precedent for granting certiorari in the instant case. In the *Field* case the decision of the state court which the Circuit Court of Appeals failed to follow, clearly decided a point of local law, but the United States Circuit Court of Appeals differed with the conclusion of the state court. While the opinion in the *Sinnott* case is not clear, the fact is, that the *Sinnott* case did not decide the point of law which the Circuit Court of Appeals herein assumed it did decide. On the contrary, the point of law which the Circuit Court considered was decided in the *Sinnott* case was never in issue in that case (infra pp. 24-8).

Compare also the decision of this court in *Burns Mortgage Co. v. Fried,* 292 U. S. 487, 54 S. Ct. 813, 78 L. Ed. 1380, 92 A. L. R. 1193, wherein this court ruled that a state statute which codifies the common law becomes a matter of local law, and the rule of decision of the *highest* court of the state is the rule which the Federal court should follow. Also, that in the absence of a decision by the *highest* court of the state the Federal courts were free to decide the controversy in accordance with the accepted canons of construction.

See, also,

Russell v. Todd, ... U. S. ....., 60 S. Ct. 527, 84 L. Ed. 517 (advance opinions);

Wichita Royalty Co. v. City Nat. Bank, 306 U. S. 103, 107, 59 S. Ct. 420, 83 L. Ed. 515, 517.

When this court used the term "highest court of the state" it did so advisedly.

The opinion of the Circuit Court of Appeals herein notes the fact that while there was a petition for a hearing in the State Supreme Court after decision in the District Court of Appeal in the *Sinnott* case the petition to the State Supreme Court *"was not on this point"*. (R. 2629). The highest court of the state was not asked to review the point here in question. This disposes of the argument made in Petitioners' Brief to the effect that the denial of a hearing by the California Supreme Court made the decision of the District Court of Appeal *stare decisis.*

b. In California the denial by the Supreme Court of a petition for hearing therein after decision by a District Court of Appeal does not mean approval by the Supreme Court of the opinion and decision of the lower court.

Petitioners argue contrary to the rule stated in the above caption, but the cases do not support them.

The leading case on this point is *People v. Davis,* 147 Cal. 346, 350, 81 Pac. 718. In that case the California Supreme Court said:

> "It is proper to add that the denial in any case of an application for the transfer of a case decided by a district court of appeal is not to be taken as an

expression of an opinion by this court, or as the equivalent thereof, in regard to any matter of law involved in the case and not stated in the opinion of that court, nor, indeed, *as an affirmative approval by this court of the propositions of law laid down in such opinion.* The course to be pursued by this court in the exercise of its power in any case is a matter in which the objects above stated are the controlling considerations, and it will not hold itself bound even where questions of law alone are involved, to order a transfer of the cause, after a decision of the district court, except where it shall appear necessary in order to carry out the above-stated purposes of securing uniformity of decision and the settlement of important questions of law. The significance of such refusal is no greater than this—*that this court does not consider that the interests of justice, or the purposes for which the power was given, require its exercise in the particular case.*"

This principle of law has received repeated approval by the California Supreme Court. Cases approving this holding are:

Bohn v. Bohn, 164 Cal. 532, 537, 129 Pac. 981;

In re Stevens, 197 Cal. 408, 423, 241 Pac. 88;

People v. Rabe, 202 Cal. 409, 418, 261 Pac. 303;

Seney v. Pickwick Stages, 206 Cal. 389, 391, 274 Pac. 536;

Shelton v. Los Angeles, 206 Cal. 544, 550, 275 Pac. 421;

Western Lithograph Co. v. State Bd. of Equalization, 11 Cal. (2d) 156, 157, 78 Pac. (2d) 731.

It will be noted from the above cases that the position of the Supreme Court of California in passing upon petitions for hearing in the Supreme Court after decision by a District Court of Appeal is not unlike the position of the Supreme Court of the United States in passing upon petitions for the issuance of a writ of certiorari. The considerations which prompt this court to grant such petition have been heretofore stated by this court a number of times. For convenience of reference we quote a short excerpt from one of the cases aptly stating the rule:

> *Magnum Import Co. v. Coty,* 262 U. S. 159, 163, 43 S. Ct. 531, 67 L. Ed. 922, 924.
>
> "The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes: first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of appeals another hearing."

See also cases infra, pages 28-9.

c. The California District Courts of Appeal have held, and the California Supreme Court recognizes, that the decision of a District Court of Appeal in one district is not binding on another.

The argument made at page 20 and the following pages of Petitioners' Brief to the effect that the decision of one District Court of Appeal in California binds the others, particularly when a petition for a hearing has been made

to the Supreme Court after decision in the District Court of Appeal and that petition has been denied, is not a correct statement of the law.

The effect of a refusal to transfer a case to the Supreme Court after decision by a District Court of Appeal has been settled by the decision in *People v. Davis,* supra, and the decisions noted in the previous subdivision of this brief which affirm the rule of the *Davis* case. Notwithstanding the clearcut holding of the *Davis* case, some decisions of the District Courts of Appeal have, without citation of the *Davis* case, or of any other decision of the California Supreme Court affirming the rule in the *Davis* case, made general and loose statements to the effect that the denial of a petition for hearing in the Supreme Court gives a decision of a District Court of Appeal "all the authority of a pronouncement by the Supreme Court itself" (*Bridges v. Fisk,* 53 Cal. App. 117, 122, 200 Pac. 71). Such reasoning is contrary to the law of the state as established by *People v. Davis,* supra, and to the line of authority following that case.

The statement quoted above from *Bridges v. Fisk,* supra, and similar statements appearing in other cases cited at page 20 of Petitioners' Brief, are not necessary to the decisions in the several cases in which the statements are found.

That there is a conflict in the decisions of the several District Courts of Appeal in California on this point is recognized in the opinion of the Circuit Court of Appeals herein (R. 2629). In addition to the decisions noted in the opinion of the Circuit Court of Appeals, the hereinafter

mentioned cases all from District Courts of Appeal in California, either directly, or by implication, recognize that one District Court of Appeal is not bound by a decision in another. These cases are as follows:

Danley v. Superior Court, 64 Cal. App. 594, 599, 222 Pac. 362:

"And while it is true, as contended by the respondents, that the opinion and judgment of another department of the District Court of Appeal *is not binding upon this court,* nevertheless such opinion and judgment has its persuasive effect and if we agree both in the reasoning advanced and the conclusion reached it is our privilege and our duty to adopt the same."

McMillan v. Greer, 85 Cal. App. 558, 563, 566, 259 Pac. 995.

In this case the court expressly refused to follow the decision of another District Court of Appeal.

And in *Stone v. San Francisco,* 27 Cal. App. (2d) 34, 80 Pac. (2d) 175, the following appears (27 Cal. App. (2d) 37):

"Respondent relies principally upon Armas v. City of Oakland, 135 Cal. App. 411 (27 Pac. (2d) 666, 28 Pac. (2d) 422), *which case was repudiated* by Lossman v. City of Stockton, 6 Cal. App. (2d) 324 (44 Pac. (2d) 397), Rogers v. City of Los Angeles, 6 Cal. App. (2d) 294 (44 Pac. (2d) 465), and later by Raynor v. City of Arcata, 11 Cal. (2d) 113 (77 Pac. (2d) 1054)."

Notwithstanding that all but one of the decisions referred to are by District Courts of Appeal, it will be noted that

one District Court of Appeal "repudiated" the decision of another.

In *Raynor v. City of Arcata,* 11 Cal. (2d) 113, at page 120 (77 Pac. (2d) 1054), the Supreme Court of California recognizes this conflict in the decisions of the appellate courts. It is to be noted that despite the conflict the Supreme Court of California *has never ruled* that one District Court of Appeal is required to follow the decision of another. It would appear that if this were the rule the Supreme Court would long since have said so. Not only has the Supreme Court not said so but it has repeatedly reaffirmed the holding of *People v. Davis,* supra, to the effect that its refusal to hear a case decided by a District Court of Appeal does not imply an approval by the Supreme Court of the opinion of the lower court.

A District Court of Appeal in California is no more bound by a decision of another District Court than is one United States Circuit Court of Appeals bound by that of another circuit.

In *Skaggs v. Taylor,* 77 Cal. App. 519, 247 Pac. 218, cited by the lower court in its opinion and noted in Petitioners' Brief (page 20) the decision which was followed was a previous decision of the *same* District Court of Appeal.

It has also been held by the Supreme Court that a decision of a District Court of Appeal in a similar case *between the same parties, involving the same issues* which decision the Supreme Court refused to review after decision by the District Court of Appeal established no precedent which the Supreme Court was required to follow:

Bohn v. Bohn, 164 Cal. 532, 129 Pac. 981, the California Supreme Court saying (164 Cal. 537-8):

> "Our further examination of the case has led us to the conclusion that the Department opinion was correct. The principal reason for granting a hearing in Bank was that, in a case between the same parties, presenting precisely the same issues of fact and law, the district court of appeal for the second appellate district had reversed an order like the one here appealed from, and that a petition to have the appeal transferred to this court for hearing and determination had been denied. (Bohn v. Bohn, 16 Cal. App. 179, (116 Pac. 568).) It is, of course, much to be regretted that opposite rulings should be made in two cases which present identical questions. But an order by this court, refusing to transfer a cause after judgment in the district court of appeal, *does not adopt the opinion of the appellate court* so as to give it, in this court, the authoritative effect which one of our own decisions would have. Being now convinced that the order appealed from should be affirmed, we must so declare, even though this view necessarily involves the conclusion that the earlier appeal should have been transferred to this court, and thereupon disposed of by a judgment differing from that rendered in the district court of appeal. Indeed, believing, as we do, that the order now under review was properly made, it would be our duty to affirm it, even if this court had itself, in another case, reversed an order similar in all respects."

The case of *Eisenberg v. Superior Court,* 193 Cal. 575, 226 Pac. 617 (cited in Petitioners' Brief, page 24), does not say that the refusal by the Supreme Court to transfer a

case *shall* be taken as an approval of the conclusion reached by the District Court of Appeal, but merely states that it *may* be so taken.

If neither the Supreme Court of California, nor another District Court of Appeal is bound by a decision of a District Court of Appeal, but may "repudiate" such as one California case says, clearly neither the United States Circuit Court of Appeals nor this court is so bound.

d. The California District Courts of Appeal are courts of limited and not state-wide jurisdiction.

While it is true, as petitioners contend, that the California Supreme Court may transfer any case pending therein to any District Court of Appeal for decision and may also transfer a case from one District Court of Appeal to another, these District Courts of Appeal are nevertheless not of state-wide jurisdiction. California is divided territorially into four districts, each with a District Court of Appeal (R. 2629), and the various counties in the state are respectively allocated to one of these districts.[3] A case may be appealed from a Superior Court *only* to that particular District Court of Appeal to which said county is allocated.

Some of the material provisions of the present sections 4a, 4b and 4c of article VI of the California Constitution were once part of former section 4 of article VI. In so far as material to the decision of this case, however, the

(3) At pages iv and v of the Appendix to Petitioners' Brief the constitutional provisions for allocation of the several counties to the respective district courts of appeal are printed.

language of the Constitution in force when *Sinnott v. Schumacher* was decided was substantially the same as that of the present Constitution.[4]

It will be noted that the appellate jurisdiction of the District Courts of Appeal is limited except as to matters which are transferred to a District Court of Appeal by the Supreme Court, and that jurisdiction is not state-wide. But even if jurisdiction were state-wide, in view of the express limitations which have been placed upon their decisions by the Supreme Court of the State, their decisions, even when the Supreme Court refuses a hearing, are not those of the *highest* court in the state, which the Federal courts are required to follow.

e. In the case of Sinnott v. Schumacher the California District Court of Appeal did not hold that liquidated damages could not be awarded for delay caused by abandonment.

This case has been interpreted differently by the trial court and the Circuit Court of Appeals herein.

The two lower courts herein make different interpretations of the *Sinnott* case. At the trial petitioners relied upon two California cases which they argued held that liquidated damages for delay could not be recovered in California in the case of an abandoned contract. One of these was the *Sinnott* case, the other *Bacigalupi v. Phoenix Bldg. etc. Co.*, 14 Cal. App. 632, 112 Pac. 892. The position taken by petitioners in the trial court appears from the opinion of that court (R. 135-6). Petitioners in

(4) Excerpts from the California Constitution applicable to the district courts of appeal appear in the Appendix to Petitioners' Brief, pages i to vii.

the trial court made no distinction whatever between these two cases, but argued that each supported their contention that after abandonment liquidated damages for delay could not be recovered (R. 135-6).

The trial court held that while these cases permitted an aggrieved party to sue for the actual damage caused by abandonment *apart from damage caused by delay,* the rule in neither case prevented a party from recovering liquidated damages for delay (R. 136). Like petitioners, the trial court made no distinction on this point between the two cases, but it did not follow petitioners' interpretation of either (R. 136).

The opinion of the trial court regarding the *Bacigalupi* case is in accord with the interpretation of that case by the United States Circuit Court of Appeals for the Second Circuit in *Southern Pacific Co. v. Globe Indemnity Co.,* 21 F. (2d) 288 and by the Circuit Court of Appeals herein (R. 136). In distinguishing the *Bacigalupi* case the Circuit Court of Appeals herein said (R. 2628):

> "Bacigalupi v. Phoenix Bldg. etc. Co., 14 Cal. App. 632, 637, where *no damage was awarded for delay* and the appellant merely claimed that the liquidated damage clause for delay prevented a recovery for the increased cost of completing the building."

With reference to *Sinnott v. Schumacher,* however, the opinion of the Circuit Court of Appeals herein states as follows (R. 2628-9):

> "Appellants argue that we are bound by the decision of a California District Court of Appeal in Sinnott v. Schumacher, 45 Cal. App. 46, 52, 53. There

> the contractor had abandoned the contract and, while the fact does not appear on the face of the opinion, actual damages for delay were allowed in lieu of the liquidated amount. In that case there was a petition for hearing by the Supreme Court of the state, *but not on this point.* The decision is adverse to ours, but the court failed to consider the authorities and stated its mere conclusion without reasoning. The case is not persuasive, and we think was wrongly decided."

The Circuit Court of Appeals herein, by the extract of its opinion above quoted, points to the only difference between the *Sinnott* case and the *Bacigalupi* case. In the *Bacigalupi* case as the opinion in *Southern Pacific Co. v. Globe Indemnity Co.,* supra, and also the opinion of the Circuit Court Appeals herein states, there was no endeavor to recover *any* damages for delay. In the *Sinnott* case the owners did not seek *liquidated damages for delay,* but sought to recover actual damages only.

The record in the Sinnott case proves that liquidated damages were not sought therein; the Circuit Court of Appeals was in error in its interpretation of that case, and the construction of the Sinnott case by the trial court herein was the correct one.

The record in the *Sinnott* case shows that damages were allowed for the increased cost of completing the work over the contract price and other items caused by the breach including $2,641.14 damages for delay, the reasonable value of the use and rental of the building to be constructed for three months' delay at the rate of $880.38 per month. The pleadings did not ask for liquidated damages and there was *no issue on that question.*

In the appendix (page i) we have printed paragraph V of the amended cross-complaint in the *Sinnott* case, which shows that the pleading for damages for delay was for the reasonable monthly rental. This paragraph of the amended cross-complaint is the entire allegation thereof dealing with damages for delay. The findings of the court on this issue are likewise set forth in the appendix (page i) and are to the effect that the plaintiff was entitled to the reasonable market value of the use and rental of the building of $880.38 per month for three months, or a total of $2,641.14. We have also listed in the appendix (pages i to iv) quotations of the briefs of both the appellant and the respondent in the *Sinnott* case on the matter of the allowance of damages for delay. These extracts from the briefs show beyond any question that liquidated damages for delay were never an issue in the *Sinnott* case.

There is another fact which proves that such damages were never in issue. It is the rule in California that a claim for liquidated damages must be based upon a pleading affirmatively bringing the case within the exception stated in section 1671 of the California Civil Code:

Kelly v. McDonald, 98 Cal. App. 121, 125, 276 Pac. 404, 406;

Mente & Co. v. Fresno C. & W. Co., 113 Cal. App. 325, 331-3, 298 Pac. 126, 128, 129;

Long Beach City School Dist. v. Dodge, 135 Cal. 401, 405, 67 Pac. 499.

The excerpts printed in the appendix from the pleadings show that the only pleading in the *Sinnott* case for damages for delay sought *actual* damage for delay, that is to

say the reasonable market value of the rental of the building, as distinguished from liquidated damages for delay. There was no other pleading and the findings show no other issue on damage for delay.

f. The opinion in Sinnott v. Schumacher is too indefinite and the case not of sufficient importance to warrant this court reviewing the action of the lower court.

We have already pointed out that the trial court and the lower court made different interpretations of the ambiguous language of the opinion in the *Sinnott* case. Also that the record discloses that in the trial court petitioners concluded that the case of *Bacigalupi v. Phoenix Bldg. etc. Co.*, supra, and the *Sinnott* case decided the same principle of law. Each of the lower courts herein have ruled that the *Bacigalupi* case does not support petitioners' argument. We have shown that when the record in the *Sinnott* case is checked against the opinion in that case, it is clear the *Sinnott* case likewise does not support petitioners' argument and that the interpretation of the trial court herein is correct, that of the Circuit Court of Appeals wrong.

In *Layne and Bowler Corporation v. Weston Well Works, Inc.*, 261 U. S. 387, 393, 43 S. Ct. 422, 67 L. Ed. 712, 714, in speaking of the position of this court in granting certiorari on a conflict of decision between two Circuit Courts of Appeal this court announced the following rule:

> "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case

before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a *real and embarrassing* conflict of opinion and authority between the *circuit courts of appeal.* The present case certainly comés under neither head."

In re Woods, 143 U. S. 202, 12 S. Ct. 417, 36 L. Ed. 125, wherein this court ruled (36 L. Ed. 126):

"But we do not regard the inquiry as to whether it was settled law in the State of Minnesota that a judgment of dismissal in a former suit, such as pleaded here, was not a bar to a second suit upon the same cause of action, or whether the law in respect of recovery by a servant against his master for injuries received in the course of his employment was properly applied on the trial of this case, as falling within the category of questions of such gravity and general importance as to require the review of the conclusions of the Circuit Court of Appeals in reference to them."

Certainly the vague and inconclusive opinion in the *Sinnott* case does not warrant this court in departing from the rule announced by its decisions in the two cases last cited.

g. Cases cited by petitioners under point A distinguished.

Petitioners in their brief (pages 27-33) cite several cases to the point that this court has held that United States courts sitting in California are bound by decisions

of California District Courts of Appeal where the Supreme Court of California has denied a hearing after decision in the District Court of Appeal.

In this contention petitioners are in error. The precise point whether a Federal court is bound by a decision of a state court other than the *highest* court of the state was not presented in any of the cases cited. Furthermore as the Circuit Court of Appeals noted in its opinion herein, in the *Sinnott* case a review by the California Supreme Court was not asked on the point material to this case (R. 2629).

If the Federal court is impressed with the reasoning of an intermediate state appellate court there is no rule which says that then the state court may not be followed. But this is quite different from saying that if the Federal court disagrees with the holding of an inferior state court the decision of the latter court *must* be followed. *Erie Railroad Co. v. Hilt,* 247 U. S. 97, 38 S. Ct. 435, 62 L. Ed. 1003 (cited in Petitioners' Brief, page 29) does not support the latter contention.

II.

THE CIRCUIT COURT OF APPEALS DID NOT ERR IN HOLDING THAT THE STIPULATION IN THE CONTRACT FOR LIQUIDATED DAMAGES WAS VALID UNDER THE LAW OF CALIFORNIA.

The argument under this heading is directed to Point B of Petitioners' Brief, pages 33-39 thereof. It is not the law in California that liquidated damages cannot be recovered in a contract such as that involved herein.

Section 1671 of the California Civil Code expressly provides:

> "The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage."

All that is required is that there shall be pleading and proof of the inability to fix the actual damage. Once that is established, the agreement for liquidated damages is enforceable, but the test of impracticability is to be applied *as of the date when the contract was made,* not after completion, nor at the time of trial (*Hanlon Drydock and Shipbuilding Company, Inc., v. McNear,* 70 Cal. App. 204, 232 Pac. 1002).

In the instant case the actual damage which would result from a failure to complete the contract on time could not be fixed with any certainty when the contract *was made.* The opinion of the Circuit Court of Appeals recites the facts which show the District both pleaded and proved this (R. 2625). The record supports the opinion (R. 55-7; 2522-4; 2534-6; 2527-8; 2532; 2544-6).

The opinion of the lower court is also supported by ample authority. In the interest of space we will not here recite that authority but refer to the opinion of the Circuit Court of Appeals and to the page of the record where these cases are collected (R. 2626). Petitioners have not pointed to any California case which holds that liquidated damages cannot properly be allowed in a case of this character. On the contrary it is the universal rule that

the principle which allows liquidated damages applies with special force to contracts for public improvements for the breach of which there may be no other adequate measure of damage. (See note appearing in 1912C Ann. Cases p. 1028; *Parker etc. Co. v. City of Chicago,* 267 Ill. 136, 107 N. E. 872, 1916C Ann. Cas. 337.)

A California case in point is *Consolidated Lumber Co. v. City of Los Angeles,* 33 Cal. App. 698, 166 Pac. 385, which involved a public contract where a clause for liquidated damages was upheld. In that case the court further ruled that a declaration in the contract that the damages for a breach thereof would be extremely difficult to fix (33 Cal. App. 700):

> "* * * tends strongly to establish the fact required by the statute to exist; and, further, tends to control the question as to whether the provision is one for liquidated damages or for a penalty, where the contract appears upon its face to be one allowed by the terms of section 1671 * * *"

Wise v. United States, 249 U. S. 361, 39 S. Ct. 303, 63 L. Ed. 647, was a case in this court where a clause providing for liquidated damages of $200 a day was upheld. Such sum was held to be reasonable where the cost of the buildings to be erected was approximately $1,000,000. The contract price for the improvement in the instant case was over $3,600,000 (Vol. VIII Book of Exhibits, Pl's. Ex. 16, p. 162). The liquidated damages of $500 a day here allowed is proportionately the same as that approved by this court in the *Wise* case.

Other cases in which this court affirmed the allowance of liquidated damages in construction contracts are cited in the opinion of the lower court (R. 2626). There was no error in the allowance of liquidated damages to the District.

None of the cases cited by petitioners under this point (Petitioners' Brief, pages 33-37), holds that liquidated damages cannot be awarded under the facts of the instant case.

III.

EVEN IF LIQUIDATED DAMAGES SHOULD NOT HAVE BEEN ALLOWED, THE DISTRICT WAS ENTITLED TO ITS ACTUAL DAMAGE FOR DELAY WHICH IN THIS CASE EXCEEDS THE AMOUNT ALLOWED AS LIQUIDATED DAMAGES.

A provision for liquidated damages cuts both ways. An illustration of this is found in the case of *Hanlon Drydock etc. Company Inc., v. McNear,* supra. There the liquidated damage clause which was held to be valid, provided for a payment of $400 a day for delay and the total liquidated damages allowed was $9,200. The contention on appeal was that the court should have held the provision for liquidated damages invalid and have awarded appellant the actual damage suffered of $60,000 in lieu of the lesser amount.

In the instant case the District is not seeking both liquidated and actual damages. The District tried the case on the theory that the liquidated damage clause was valid. If it is, as we believe it is, the clause controls the amount

which may be awarded as damages for delay, even though the actual damages exceed the stipulated liquidated amount. If the provision is invalid, as petitioners contend, then the District is entitled *to its actual damage* notwithstanding that this exceeds the liquidated damage. It is not the law that a contractor may breach a contract and deprive the aggrieved party of *all* damage.

The delay for 433 days at $272.89 a day (Ex. X-114, Book of Exhibits Vol. VIII 595), which was the amount found by the court to be the damage the District suffered in order to keep its organization intact, amounts to $118,-161.37 (R. 203). The interest on the outstanding bonds which the District had to pay during this period was $89,-832.67 (Ex. X-115; R. 2527-8; R. 204). The total damage to the District resulting from delay was, therefore $207,-994.04. The liquidated damages allowed were only $142,000. The difference is in petitioners' favor. We are not unmindful of the fact that petitioners undoubtedly will claim that the items of interest charges and the cost of operating the District were first placed in evidence by the District in order to show that the amount claimed as liquidated damages was reasonable, and to support its claim for liquidated damages (R. 2519-20; 2544-6). In that petitioners will be correct. The District tried the case on the theory that it was entitled to liquidated damages only (R. 2545; 2566-7; 2606-7). In addition to the expense to which the District was put because of the delay the District also placed before the trial court other evidence showing the great inconvenience, damage and delay suffered by the public apart from the damage to the District as a corporate entity (R. 2544-6).

Before the case was concluded, however, and in the course of the many attacks made by petitioners on the District's evidence, the District stated clearly and unequivocally that it wished the damage item of $272.89 a day, the cost of keeping the District intact and the interest charges of $89,832.67 during the period of delay *to be considered for all purposes* and as independent and substantive items of damage (R. 2595-9; 2610).

The District steadfastly argued for the integrity of the liquidated damage clause (R. 2519-20; 2544-6; 2567; 2606-7), but it is obvious from the position it took at the trial that it wished to have evidence before the court to sustain an award for actual damages for delay if the liquidated damage clause was to be ignored.

In the appendix to this brief (pages iv to ix) we have printed portions of the record showing the District's position on these items of damage.

The petitioners at the trial moved to strike out all evidence of the District regarding damages for delay, including not only the damage to the traveling public but the interest item and the daily expense item to the District during the period of delay (R. 2607-10). Thus, the Petitioners squarely presented their position to the court. They did this *after* the District had clearly defined its position that it wanted all evidence of delay considered *for all purposes.* Under these circumstances we contend that the evidence of delay which supports actual damage, as well as the evidence of delay which supports liquidated damage was properly before the court.

CONCLUSION

It is respectfully submitted that for the reasons stated the writ should not issue.

Dated: Oakland, California, August 21st, 1940.

ARCHIBALD B. TINNING,
THEODORE P. WITTSCHEN,
Attorneys for Respondent.

(APPENDIX FOLLOWS.)

Appendix

Excerpts from pleadings, findings and briefs in case of Sinnott v. Schumacher, 45 Cal. App. 46, 187 Pac. 105.

Paragraph V, Amended Cross-Complaint in Sinnott v. Schumacher.

"V. These defendants have been further damaged on account of the delay in the completion of said building, * * * to-wit: the period of three months, at the monthly rental of $124 (sic) a month, or $3,052; also the further sum of $1500 for attorney's fees to prosecute this action and for legal services in connection with the completing of the said building, and representing these defendants in different actions commenced to foreclose liens for work and labor performed under said plaintiff."

Paragraph VI, Findings in Sinnott v. Schumacher.

"VI. That by the acts of Sinnott and said Surety the defendants were reasonably and necessarily delayed in the completion of the building for the period of three months, and that the reasonable market value of the use and rental of said building, during said time, is the sum of $880.38 per month or total $2641.14, in which sum the defendants were damaged."

Excerpt from Plaintiff's Opening Brief, page 19, in Sinnott v. Schumacher.

"EIGHTH FINDING ATTACKED ($2641.14 rents). Find. VI, (Ax. IX.) That by delay in completion, owners were damaged in $2641.14. According to our evidence

there was no delay, but ignore our evidence and still defendants produced no evidence that Sinnott delayed the completion beyond 5 days, the damage for which under the contract is $10 per day or $50. We need not go to the reporter's notes for it is found (Find. IV, Ax. VIII), that Sinnott on Dec. 12 quit and wholly abandoned the said contract and work and since so continued to quit, and that on Dec. 14 owners gave Sinnott 3 days to go on with the work, which he did not do. Under the contract the owners on Dec. 17, had the right to enter upon the premises and furnish, etc. Said contract (Sec. 17, * * *, Tr. 2664) provides, that when the 3 days are up the owners shall then have the right to enter upon the premises and furnish (materials, etc.). And contract (Sec. 17, * * *) provides 'that whenever * * * the owner * * * shall have the right to enter upon the premises and furnish, etc., and shall exercise that right,—that from that time on the full direction and control of the completion * * * shall be under the direction of the owner and the authority of the contractor * * * shall cease.' Find. IV finds that Sinnott quit and abandoned on Dec. 12 and did so ever since. The owners' right accrued Dec. 17. Thence on Sinnott's 'authority ceased.'

From Dec. 12 to 17 is 5 days at $10 is $50. The contract fixes this as the maximum damage. It says damage for said delay shall be limited to a charge of $10 per day which is to be deducted from the contract price and is arbitrarily so fixed because the 'actual damage is from the nature of the case impracticable and extremely difficult to fix' (idem.) Besides this, Sinnott on Dec. 22 served owners with notice of rescission of contract (Tr. 1508) and that he would sue and he never was on the premises after Dec., 1914.

He filed this suit Jan. 13, 1915, and yet Find. VI, (Ax. IX) says we delayed them 3 months from (Find. V, Ax. IX) Dec. 20, 1914, to March 20, 1915, during most of this time we were trying parts of this case in court on the basis of a confessed abandonment by us because of the breach of contract. Such a finding is destitute of support."

Excerpt from Respondents' Reply Brief, page 35, in Sinnott v. Schumacher.

"The eighth finding attacked by appellant that by delay in completion owners were damaged in the sum of $2641.14;

Finding IV states:

'That said plaintiff Richard Sinnott after the execution of said contract and bond commenced to perform the work provided to be performed by the said contract and thereafter and to-wit, on the 12th day of December, 1914, voluntarily and without fault or provocation on the part of the defendants and cross-complainants, Maria Schumacher, H. W. Ludemann and Hermine Ludemann, or any of them, quit and wholly abandoned the said contract and the work he was then performing under and pursuant thereto * * * and that said Richard Sinnott and the said Pacific Coast Casualty Company thereupon and thereafter and without the fault of the owners wholly failed, neglected and refused to supply a sufficiency of any materials or workmen to complete the said contract or to perform the same.'

Finding VI:

'That by reason of the acts of the plaintiff, Richard Sinnott, and cross-defendant, Pacific Coast Cas-

> ualty Company, in abandoning said contract and the work therein provided to be done and in failing, neglecting and refusing to complete the said building and the said contract, said defendants and cross-complainants * * * were thereby deprived of the use, occupation, income and rental of the said premises and the building provided to be constructed thereon for the said period of three months and that the reasonable market value of the use, occupation and rental of said building and said premises during said time is and was the sum of $880.38 per month or the total sum of $2641.14.'
>
> This breach of the contract by appellant and his refusal to construct the building in accordance with his contract, *is an entirely different matter from and not to be confused with the question of delay* in time of completion as specified in the contract; the former is founded upon an absolute breach of contract and is for general damage, whereas the latter would be special damage under the terms of the contract had it been otherwise fulfilled."

Excerpts from record concerning damages for delay.

In connection with the testimony of Wallace B. Boggs, the following statements were made (R. 2519-20):

> Mr. Tinning (Counsel for District): The purpose of this offer, your Honor,—we have pleaded as one of the matters in this defense the penalty of $500 per day. We are offering this line of testimony to show, for instance, what the daily cost of operation of the District was. We also expect to offer proof with respect to the bond interest, and also with respect to the loss to the public by the fact they were unable to use this tunnel during the certain period of time.

Now, that proof simply goes to the point of the penalty being somewhere within striking distance of the actual loss incurred.

The Court: How is the Court going to measure that?

Mr. Tinning: I don't think the Court does, your Honor. I think, if we are entitled to a penalty, that the thing then is to determine the penalty itself is not unreasonable.

Mr. Smith (Counsel for Contractor): What did your Honor say? I did not hear your remark.

The Court: I inquired how the Court was going to determine any damage for the public using, or the failure to use, this tunnel. He answered that by saying it has to do with the penalty and the imposition of the penalty. The penalty itself is prescribed by——

Mr. Tinning: Yes, by that contract.

Mr. Smith: If they want to call it a penalty, let them accept that as his definition. The law in California provides you cannot enforce a penalty. I understood the theory was they were trying to recover on the basis of liquidated damages. They have no right to recover any penalty. The law is as clear as a bell on that, particularly because penalties are absolutely proscribed under our California law. You cannot recover a penalty. The assertion is made, in their cross-complaint, that it is a claim for liquidated damages.

The Court: I think we are confused. I don't think he expects to go beyond the penalty clause here.

Mr. Tinning: We don't expect to go beyond the liquidated damage clause. What we are showing is: it is part of the contract and it is not an unreasonable provision, in view of the situation that exists.

* * * * * * *

Record, pages 2566-67:

Mr. Wittschen (Counsel for District): Your Honor, so that the record may be clear, that portion of plaintiff's motion which is directed to the cost of protecting the work and taking care of the project until new bids were called is an element of damage that springs from the breach. The cost of the bond issue, the interest on the bonds, the cost as shown to the traveling public, and those matters that counsel claims are speculative were not offered and *we are not asking for those as specific items of damage.* They were merely offered to show two things, one that the liquidated damages were not unreasonable, and also to show the difficulty of the proof of actual damages. The law in California is that where actual damages cannot be proven, or that their proof will be extremely difficult, the parties may agree upon reasonable stipulated liquidated damages, and as I said before and now repeat *we are not asking for double damages,* we are not asking for damages in excess of the penalty of $500 a day, but we are asking for damages for that penalty because we think it is reasonable, and because it comes within the rule. And we rely upon the cases that are all in the last brief that I handed to your Honor, which I called "Defendant's First Supplemental Brief"—there are two or three cases in there that are squarely on the point; the latest, perhaps one of the best considered cases, is that City of Reading Case; and I have also put in numerous cases from California which hold that a penalty of this kind is proper or liquidated damages in lieu of the penalty.

• • • • • • •

Record, pages 2595 to 2598:

Mr. Wittschen (Counsel for District): If there is any doubt about it we would like to put Mr. Boggs on the stand and let them cross-examine him. Otherwise we want our statement accepted as a fact, that none of the costs of this litigation are reflected in Exhibit X-114. It is just the ordinary cost of continuing the District, the running expense of the District's operations. The cost of the engineers and other items of expense would have dropped the moment the job was finished, because the Counties took over the work.

The Court: If there is any question about it, that it is an incorrect statement, if you wish to call him in the matter——

Mr. Smith (Counsel for Contractor): I think I can clarify the matter. Wasn't the exhibit offered solely for the purpose of showing that you had an item of expense and not to prove the figures?

Mr. Wittschen: I wanted to straighten that out as soon as I had an opportunity to talk. I was going to then, but I would like to do it now, because Mr. Boggs is here. That item of $278 a day, the cost of keeping the District, is put in for a two-fold purpose. It was put in first to show that there was the actual expenditure as a fact, *and if there is anything in the record to the contrary it is now withdrawn,* because the intent was to put that in as a fact. The other item that we intended to put in as a fact was that there was $89,000 of bond interest during this time of delay. Those two things were facts, and when added together they total $500 (a day), and they were put in both as factual matters and also to show that the claim for liquidated damages was not unreasonable. The $419 a day which would be the cost

of people using the road because they had to travel two miles more was simply put in to show the difficulty in ascertaining actual damages; but the other two items, the cost per day of the District and the bond interest, were two elements of fact, and Mr. Marrin in his brief has regarded them as facts and has stated them as facts.

Mr. Marrin (Counsel for Contractor): Oh, no, just the reverse. I understood they were offered distinctly for the purpose of showing that the amount of damages was difficulty to fix, that they were not offered as facts and as a part of the actual damage.

Mr. Wittschen: *You have some basis for that* because it was stated in the paragraph along with the other items but now that this case is not closed and the controversy has arisen—we do not need to recall the witness—*I state to you now we want them considered over your objection as proof of a fact, and if you want to cross examine on them you may.*

Mr. Smith: At the time the evidence went in I happened to be conducting the questioning for the Six Companies, the plaintiff, and I objected to the testimony and your Honor admitted it subject to a motion to strike.

Mr. Wittschen: That is right.

Mr. Smith: On the same subject, there were three matters involved. There was this exhibit regarding the cost and maintenance of the District, which you called Cost maintenance of the District, I understood. Mr. Tinning was putting in the evidence. There was the Exhibit offered for the purpose of showing the amount of alleged bond interest, which they were paying every day, and then there was miscellaneous testimony, not in exhibit form, of the so-called traffic per day, and capitalized into an imaginary figure up

into the stratosphere somewhere, and I objected to all of those three items on the ground they were immaterial, and Mr. Wittschen said in so many words for the record that they were being offered for the sole purpose of showing the difficulty of showing liquidated damages.

The Court: He so stated now.

Mr. Smith: Yes.

Mr. Wittschen: No, I said that that speculative feature, the cost to the general public, was solely to show the difficulty of ascertaining the liquidated damages. I ask your Honor to consider, and if *there is any misunderstanding now is the time to straighten it out,* that the proof of $272.89 a day is not only for that purpose but it is actual proof of the loss that the District incurred, because the District, in taking care of this work, had to exist a certain time longer than it would have existed and that all that expenditure related to this work and was not just the work of maintaining the District, because the District had nothing else to do, and I want that showing considered, *and if they would like to cross examine further, because they misunderstood it,* or even if we did say it before, *we now correct it,* it was a misunderstanding, and we are willing that Mr. Boggs come back. I also want considered as a fact the interest matter because whether you agree it is an element of damage or not, it is a proven fact that the bonds carried so much interest, and there were so many bonds, and I would like both of those considered as facts.